

NO. 43127-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY WHITTLES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00919-8

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail, the recognized system of interoffice communications, *or, if an email address appears to the right, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED September 17, 2012, Port Orchard, WA 
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Whittles misapprehends the standard of review this Court uses in evaluating the sufficiency of the evidence where he asks this Court to reweigh the credibility of the witnesses, and whether here, when examined under the correct standard of review, the evidence was more than sufficient for the jury to find that Whittles was the person who “totally destroyed” his ex-girlfriend’s house?

2. Whether Whittles fails to establish that his counsel’s decision not to object to a reference that suggested prior contact with the police was deficient performance, and whether he also fails to show that such an objection would have resulted in a different outcome at trial?

3. Whether the trial court’s imposition of costs directed to the expert witness fund and the special assault unit was in error? [Concession of Error]

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Timothy Whittles was charged by a second amended information filed in Kitsap County Superior Court with first-degree malicious mischief (domestic violence), with an alternative charge of third-degree malicious mischief. CP 5. After trial, the jury found Whittles guilty as charged of the

greater offense. CP 30.

B. FACTS

Around 4:00 p.m. on September 21, 2011, Kitsap County Sheriff's Deputy Kenneth Mahler was dispatched to 2412 Seabeck-Holly Road. RP 24-25.¹ It took him about half an hour to arrive at the home. RP 25. Mahler and another deputy parked at the top of the driveway and walked down toward the house. RP 26.

There was a pickup parked in front of it. RP 26, 32. The truck was over the top of a railroad tie, and appeared to have hit it. RP 28. The truck had a smashed windshield. RP 28, 36-37. There was paint transfer on the truck from another vehicle. RP 34. There was a piece of a broken taillight on the ground near the truck. RP 35.

Mahler could smell smoke. RP 28. He looked around and discovered it was coming from a smoldering pile in the back yard. RP 28, 32. There was a bra in the pile. RP 33. There was also a metal storage shed behind the house that was damaged. RP 29.

The front door of the house was open. RP 26. The door showed signs of forced entry: the frame was splintered. RP 28, 32.

¹ All references are to the report titled "Volume I" and beginning on January 10, 2012.

The front room was a shambles. RP 28. Just inside the front door was a cabinet with broken china and glass in it. RP 45-46. The furniture was turned over, including the sofa and a large cabinet. RP 28, 40-41, 47. There was a broken glass all over the sofa, and a desk drawer and a computer had been jammed into it. RP 41. The TV and its stand were knocked over. RP 47. A shelf in the corner was covered with broken glass and glassware. RP 47-48.

In the laundry room, the freezer was running and had food in it, but the door had been ripped off. RP 38, 95. On the kitchen floor were broken plates and there was food and a wine bottle strewn around. RP 41-42.

In the bedroom there were clothes scattered on the floor. RP 39. The mirror was smashed. Exh 16. RP 39.

In the dining room, the sliding glass door to the porch was shattered. RP 43-45. The glass was totally smashed out of the door and was on the floor both inside and out. RP 43-44.

About an hour after reporting to the scene, Mahler went to a trailer park at Mountain View and Clear Creek, looking for Whittles. RP 48-49. There, he saw a truck backed into a carport. RP 48. Whittles was not there. RP 49. There were fragments of broken safety glass in the back of the truck. RP 51.

Susan Christopher, aged 46, had lived at the house on Seabeck-Holly Road for six years. RP 59. She met Whittles through a mutual friend, and they dated for about six months, beginning in April of 2011. RP 59.

Although Whittles never officially moved in with her, he stayed at her home quite a bit. RP 60. In an average week he spent five or six nights at her house. RP 60. On September 20, she left around 3:00 p.m. to run some errands. RP 61. She returned in the early evening. RP 61. Whittles was playing video games when she left. RP 62. When she got home, some of their friends, Derrick Ingulsrud, and Barb Coombs, were there, watching TV and hanging out. RP 62-63. Christopher was not certain about Coombs's last name; she was a friend of Whittles. RP 62-63. They appeared to have been drinking beer, which was nothing unusual or concerning. RP 63, 67. They did not seem intoxicated. RP 67.

There had been some discord between Christopher and Whittles although she could not identify a specific cause. RP 64. They had not been getting along well for several days. RP 64.

A few days earlier, the pump had burned out on her well, but had not yet been repaired. RP 63. They only had a rain barrel for water. RP 64.

Whittles had gotten a used pump from a friend of his. RP 64. Christopher, who had been a marine pipefitter for over 25 years, could see it

was basically junk, and told him so. RP 64-65. Whittles became upset. RP 66. She did not want to get into an argument so she got up and said she was going to go to her sister's house and take a shower. RP 65. Ingulsrud and Coombs were still there when she left. RP 67. Christopher told them she would see them later. RP 67.

Christopher left around 9:00 p.m. to go to her sister's house, which was about a quarter-mile away. RP 64, 66. Her sister was out of town, but her niece and her boyfriend were staying there. RP 66. The niece had cancer, so Christopher thought it would be nice to spend some time with her as well. RP 66. She stopped at a store and picked up some chips, ice cream and soda on the way. RP 66.

Christopher took her shower, and then hung out with her niece and the boyfriend for a while. RP 68. Around 11:30, Christopher she received a text from her friend Alexis, who lived a mile or two away. RP 69, 72, 76. She called Alexis. RP 72. First she spoke to Alexis and then to Ingulsrud. RP 72-73.

After talking to them she called home and spoke to Whittles. RP 73. Whittles was very angry and demanded to know where she was, and when she told him, he did not believe her. RP 73. She hung up on him. RP 74.

About 20 minutes later, Whittles called back. RP 74. Whittles told

her to come home, and she responded that she would not if he was going to behave like that. RP 75. She asked if he had been drinking, and he said that he had not. RP 75. Then his demeanor suddenly changed, and he told her everything was fine and that he just wanted her to come home. RP 75. When she refused, he became hostile again and said, "Get here right now." RP 75. She refused. RP 75. Whittles then hung up on her. RP 75.

Ingulsrud subsequently showed up at the sister's house around or after midnight. RP 76-77. He seemed very rushed, worried, and insistent. RP 76. Christopher then decided not to go home. RP 77.

Whittles called again and they had another brief conversation. RP 77. The last thing he said was, "As far as I am concerned this relation ship is over. I am leaving." Christopher whispered, "Good." RP 77. She decided to go park in the neighbor's driveway and wait for him to leave. RP 78. Ingulsrud went with her. RP 78. They drove her Pontiac GTO. RP 78.

She parked in the neighbor's driveway which was about 100 yards down the road from hers. RP 79. She thought she was far enough from the road that he would not be able to see her. RP 79. However, it was a really bright moonlit night. RP 110. After about ten minutes she heard a loud vehicle coming down the road. RP 79. She recognized it as her truck. RP 79. Whittles drove by in it, and then slammed on the brakes and backed up

and tried to block her in. RP 79. She tried to drive around the truck, and Whittles got out of the truck and threw himself against her car door, and slammed his fists on the roof. RP 80. He was screaming at her, but she could not make out what he was saying. RP 81. He was alone. RP 80.

As she drove away, Christopher heard a loud bang or clunk on the roof of the car. RP 81-82. She was afraid it was a gun. RP 82. She saw him position his arms like they do in a cop show. RP 82. It looked like there was a gun in his hand. RP 82. She drove away as fast as she could, taking the long way through Seabeck to Port Orchard. RP 82. She called a friend who was staying in Gorst and went there. RP 84. Ingulsrud went with her. RP 85. She thought they arrived sometime after 2:00 a.m. RP 85. Christopher just sat in the car for about ten minutes, trying to catch her breath and stop shaking. RP 86. Eventually they went inside. RP 86. Her friend mixed her a drink and they watched some TV for a while. RP 86. Then she slept for a few hours on the couch. RP 86.

When she woke up around 10:00 a.m., she gave Ingulsrud a ride to his home in Belfair. RP 87, 115. Then she went shopping, and killed time. RP 87. She did not go home immediately, because she did not want to see Whittles. RP 88. She knew he had a 2:00 appointment, and would not be there then. RP 88. She picked up Ingulsrud again, and they waited in Gorst until she saw him drive by. RP 88, 116.

She arrived home a little after 2:00 p.m. RP 89. Her truck looked like it had been run into the corner of the house, and its taillights were broken. RP 89. It also had a fresh dent in it. RP 93. It had not been like that when she left the previous evening. RP 89, 93-94. Nor was the paint transfer there. RP 93. The windshield was still intact when she saw Whittles driving it the night before. RP 94.

The shed was not damaged when she left home the previous evening. RP 91. Additionally, a 1986 S-10 pickup that was parked in front of it was missing. RP 91.

The items in the burn pile, including her bra, were not there when she left. RP 92.

Inside the house, the freezer had not been damaged when she left. RP 95. Nor were the bedroom, kitchen, dining room, or living room in disarray. RP 95-101.

Christopher's insurance company had reimbursed her \$27,000 as of the time of trial. RP 102.

Around 3:00, fearing Whittles might return from his appointment, Ingulsrud and Christopher left. RP 116. They went to Ingulsrud's aunt's house and called 911. RP 116. When 911 called her back she returned to the house and talked to Deputy Mahler. RP 116.

Derrick Ingulsrud had known Christopher for more than 20 years. RP 127. He knew Whittles through her. RP 127.

He went to Christopher's home around 10:30 or 11:00 on September 20. RP 128. Whittles, Christopher, and a woman he knew only as Barbara were there when he arrived. RP 128. They sat around talking. RP 128. Around 15 or 20 minutes after he arrived, Christopher left to go take a shower at her sister's house. RP 129.

After she left, Ingulsrud and Whittles went down and worked on the well. RP 129. The well was several hundred feet behind the house in the woods and down a bank. RP 131. Whittles had a pistol and the parts for the pump with him. RP 130. He had the gun because he was afraid of the woods. RP 130. It was a 9mm that he had seen Whittles with before. RP 130. Whittles was mad because Christopher had left. RP 131. He got mad whenever she left. RP 131. He asked Ingulsrud where he thought she went, and what he thought she was doing. RP 131. They were unable to fix the well because they did not have the right kind of pipe. RP 132. After about an hour they gave up, and Ingulsrud went to his cousin's house a few miles away to see if he could get some pipe that would work. RP 132. He was gone for about an hour and returned around 1:00 a.m. RP 133.

When Ingulsrud returned he heard some crashing around in the house,

so he knocked before going in. RP 134. It sounded like breaking glass, and doors being slammed. RP 135. Only Whittles was there. RP 133. He was drinking and angry. RP 134. He had a half gallon of whiskey in his hand. RP 134. Ingulsrud went in and Whittles told him that he had tried calling Christopher, but could not get a hold of her. RP 135. He told Ingulsrud he should know where she was because they were good friends. RP 135-36. Ingulsrud told Whittles he did not know where she was and Whittles responded that it was time for him to leave. RP 135-36. He did. RP 136.

Ingulsrud went to his cousin's house and contacted Christopher from there. RP 137. He told her not to go home because Whittles was angry and breaking things. RP 137.

Ingulsrud then went back to the house to try to stop Whittles. RP 138. He knocked on the door and yelled that he knew where Christopher was. RP 138. Whittles opened the door, but did not believe him when he told him that she was at her sister's house. RP 138. Whittles was still angry. RP 138. He did see broken glass on the floor from the doorway. RP 140. It was not there earlier. RP 140. Ingulsrud never entered the house this time, and left shortly after. RP 139.

Ingulsrud then went to Christopher's sister's house. RP 140. They went outside to talk, and he told her not to go home. RP 141. She called

Whittles on the phone, and after several minutes of arguing, he heard him say he was moving out and she responded, "Good. Move out." RP 141.

Then they went in her GTO and parked near the house to see if he was going to leave. RP 141-42. After some time, Whittles drove by in her truck and then stopped and backed up, blocking their exit. RP 142. As Christopher was trying to drive around the truck, Whittles came out of the truck and took a flying leap at the car. RP 143. He had something in his hand. RP 143. Ingulsrud could not see what it was, but something metal hit the top of the car. RP 143. They took off, and as they were driving away he heard a gunshot. RP 143-44. From there they went to Gorst and spent the night a friend's house there. RP 145.

Ingulsrud did not call the police because he did not want to make any more trouble for Christopher. RP 145. He also felt it was her choice, and she did not want to. RP 145-46.

He went with her the following afternoon when she returned to the house. RP 147. When they arrived he immediately saw that a chainsaw carving she had in the front was pinned between the truck and the house. RP 148. The shed in the back had been run over. RP 148. A floor jack had been thrown through the windshield of the truck. RP 148. The front door had been kicked in. RP 148. There was glass everywhere inside and the

refrigerator door had been thrown through the sliding glass doors. RP 148. Whittles guitar, truck, and other belongings were gone. RP 148. The house was “[t]otally destroyed.” RP 148.

Whittles called several witnesses. The first was Barbara Coombs, who lived at the trailer park on Mountain View Road. RP 171. She was a friend and neighbor of Whittles. RP 172. She testified that she went to Christopher’s home around 5:00 p.m. on September 20. RP 173. Christopher was off taking a shower when Coombs arrived. RP 173. She saw Christopher at 5:00. RP 173. Whittles was fixing the well. RP 173. Ingulsrud was there also, although she knew him only as Derrick. RP 174. She went home early in the evening. RP 173. Whittles called her around 11:00 or 11:15 p.m. RP 174-75. After he called, she went and picked him up and took him back to her house. RP 175. Then they went to his trailer across the street. RP 175. Whittles did not appear intoxicated when she picked him up; he seemed upset. RP 176. He had some boxes and said he was leaving Christopher. RP 176. She went onto the back porch. RP 177. The sliding glass door was not broken. RP 177. Nothing was broken inside the house. RP 177. The shed was not damaged. RP 178. There was no smoke coming from the burn pile. RP 178-79. The TV found on the couch after the incident belonged to Whittles. RP 180. The truck at Whittles’s trailer was a Chevy. RP 181.

On cross examination, Coombs admitted that she had told the defense investigator that she had left her cell phone at Christopher's house, on the back porch. RP 185. She went back to get it around 1:30 or 1:45 a.m. RP 185. At that time she heard glass breaking in the house. RP 186. She did not see who was in the house. RP 186-87. She did not call the police. RP 188. Nor did she go to where she believed Whittles to be to tell him about it. RP 188.

Whittles's next witness, Russell Spurling, lived with Coombs. RP 189. He was also friends with Whittles. RP 190. He testified that around 11:30 to midnight on September 20, Coombs arrived home with Whittles. RP 190. Whittles was distressed about his relationship and the three of them discussed it a bit. RP 191. He did not appear to be under the influence. RP 191. Whittles stayed for about 30 to 45 minutes and then went to his old trailer across the street where some friends lived. RP 191. Spurling did not see Whittles after that. RP 192.

The final defense witness, Kendall Williams, lived across the street from Coombs. RP 196. According to Williams, Whittles dropped the Chevy truck off at Williams's house before noon on September 20. RP 196. Whittles came back around midnight. RP 196. Whittles did not appear to be under the influence of alcohol. RP 196. They played video games until about 4:00 a.m., when they went to bed. RP 196.

On cross-examination, Williams denied that he had told the defense investigator that they started playing video games at 4:00 a.m. and quit at 7:00 a.m. RP 197. On rebuttal, the public defender's investigator testified that Williams told him that he started playing Xbox with Whittles at 4:00 a.m. and that they quit and went to bed at 7:00 a.m. RP 203.

III. ARGUMENT

A. IN EVALUATING THE SUFFICIENCY OF THE EVIDENCE IT IS NOT THE ROLE OF THE APPELLATE COURT TO WEIGH THE CREDIBILITY OF THE WITNESSES; HERE, WHEN EXAMINED UNDER THE CORRECT STANDARD OF REVIEW, THE EVIDENCE WAS MORE THAN SUFFICIENT FOR THE JURY TO FIND THAT WHITTLES WAS THE PERSON WHO "TOTALLY DESTROYED" HIS EX-GIRLFRIEND'S HOUSE.

Whittles argues that the evidence was too contradictory to sustain the jury's verdict. Whittles misperceives the standard of review. Resolution of the conflicting evidence is for the jury; the State presented sufficient evidence of each element to meet its burden.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even

if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Whittles cites only two cases, *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972), and *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001), in support of his position. In his brief, paraphrases a passage from *Prestegard*, which also quotes the language he points to in *Hutton*. He utterly ignores, however, the language that immediately follows. That language reaffirms the standard of review discussed above:

Credibility determinations are for the trier of fact and are not subject to review. We must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

Prestegard, 108 Wn. App. at 23 (citations omitted). Indeed the Court in *Prestegard* went on to reject a claim similar to the present one, finding that the defendant had “confused the standard of review.” *Id.*, at 24.

Here the State was required to prove the following elements:

- (1) That on or about September 20, 2011 through September 21, 2011, the defendant caused physical damage to the property of another in an amount exceeding \$5000.
- (2) That the defendant acted knowingly and maliciously;
and
- (3) That he acts occurred in the State of Washington.

CP 24. The third element is uncontested. Nor is there any serious challenge to the second element or the monetary portion of the first. The jury viewed 29 photographs that showed that the house, RP 29-48, admittedly in Kitsap County, was “[t]otally destroyed.” RP 148.

The only question then is whether Whittles was the one who destroyed Christopher’s home. Regardless of some inconsistencies in their timelines, the State’s witnesses were entirely consistent in their general accounts of what occurred the night of the crime. Both stated that Christopher had left to take a shower at her sister’s house. Both attested to the difficulties surrounding the well. Both described phone calls between

Christopher and Whittles culminating in the break-up of the relationship. Both described the encounter near Christopher's house where Whittles attempted to block Christopher and Ingulsrud from leaving, jumped out of Christopher's truck, lunged at the car, banged on the roof, and possibly fired a shot at them as they sped away. Both described taking refuge at a friend's house in Gorst.

Ingulsrud further described hearing glass breaking when Whittles was in the house, and seeing broken glass when Whittles opened the door. Further, the truck that was previously parked in Christopher's back yard and apparently used to run down Christopher's garden shed turned up the next day at Whittles's former residence with broken glass in it.

Even defense witness Coombs testified to hearing an unknown person breaking glass in the house, and could not account for Whittles's whereabouts after midnight. Finally the only witness who gave Whittles an alibi, Williams, gave inconsistent stories. He testified at trial that he was playing video games with Whittles from 12:30 until 4:00 a.m. But he had told Whittles's own investigator before trial that they did not even start playing until 4:00 in the morning.

The jury was well within its province to discount the differences in the timelines and accept that the meat of the witnesses' testimony proved the

crime beyond a reasonable doubt. This claim should be rejected.

B. WHITTLES FAILS TO ESTABLISH THAT HIS COUNSEL’S DECISION NOT TO OBJECT TO A REFERENCE THAT SUGGESTED PRIOR CONTACT WITH THE POLICE WAS DEFICIENT PERFORMANCE; HE ALSO FAILS TO SHOW THAT SUCH AN OBJECTION WOULD HAVE RESULTED IN A DIFFERENT OUTCOME AT TRIAL.

Whittles next claims that his counsel should have objected when the victim stated that she did not want to “involve him in another police incident.” This claim is without merit because counsel could have properly decided not to emphasize the statement by objecting. Moreover, Whittles also fails to show that he would have been entitled to a mistrial or that an objection and/or curative instruction would have changed the outcome of the trial.

A defendant asserting ineffective assistance of counsel based on the failure to object to the admission of evidence must show: (1) that not objecting fell below prevailing professional standards; (2) that the objection likely would have been sustained by the trial court; and (3) that the result of the trial would have been different had the evidence not been admitted. *In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1, 37 (2004). The defendant bears the burden of rebutting the strong presumption that counsel's failure to object was a legitimate trial tactic. *Id.* “Although deliberate tactical choices may

constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, ‘exceptional deference must be given when evaluating trial counsel's strategic decisions.’” *Id.* (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). In particular, it is reasonable for counsel to not want to risk emphasizing testimony with an objection. *Davis*, 152 Wn.2d at 714.

Here, Whittles appears to contend that had counsel objected and requested a mistrial, it would have been granted, thus demonstrating prejudice. However, a mistrial is proper only when a trial irregularity is so prejudicial that it renders the trial unfair and nothing short of a new trial can ensure that the defendant will be tried fairly. *State v. Mak*, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). Whether an inadvertent remark requires reversal depends on: (1) the seriousness of the irregularity; (2) whether the statement in question was cumulative of other admissible evidence; and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow. *State v. Weber*, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983).

Whittles fails to meet his burden of showing that a mistrial would have been granted. Despite a great deal of hyperbole, he cites no authority that would compel such a result. The precedent is to the contrary. And indeed, none of the cases he cites are remotely on point.

Here all Christopher said was that she did not want him to get involved with the police again. There was no mention of what the prior involvement was. There was no suggestion that it was for a similar offense. Indeed there was no suggestion that he had ever been convicted of a crime.

The leading precedent in this context is *State v. Condon*, 72 Wn. App. 638, 865 P.2d 521 (1993). In *Condon*, a witness made three separate remarks stating or suggesting that the defendant had been in jail. *Condon*, 72 Wn. App. at 648. This Court affirmed the trial court's denial of a motion for a mistrial, concluding that the witness's remarks were ambiguous and did not indicate the defendant had a propensity to commit the charged crime or that he had even been convicted of a crime. *Condon*, 72 Wn. App. at 649. "Thus, although the remarks may have had the potential for prejudice, they were not so serious as to warrant a mistrial." *Condon*, 72 Wn. App. at 649-50. See also *State v. Lewis*, 141 Wn. App. 367, ¶¶ 89-90, 166 P.3d 786, 801 (2007) (following *Condon*, and finding that no mistrial was necessary where witness commented, "I mean, it was my understanding that [the defendant] had just been released from the penitentiary.").

Nor does Whittles demonstrate that an objection followed by a curative instruction would have changed the outcome of the proceedings. As discussed with regard to his sufficiency of the evidence claim, the evidence was overwhelming that Whittles committed the crime. He had uncontested

motive and opportunity to have done it. He had no credible alibi and was placed at the scene by three of the witnesses, including one he called. This brief reference (particularly in light of the fact that the jury knew the State's chief witness had a criminal record) could not reasonably have affected the verdict.

Finally, Whittles fails to demonstrate that counsel's decision not to object was not a reasonable trial tactic. As noted, there was no basis for a mistrial. So Whittles would at best have been left with an instruction telling the jury to disregard evidence of his prior encounter with the police. Counsel could well have reasonably decided not to highlight this brief statement. *Davis*, 152 Wn.2d at 714.

Whittles fails to meet his burden of showing either prejudice or deficient performance. This claim should be rejected.

C. THE STATE CONCEDES THAT THE TRIAL COURT'S IMPOSITION OF COSTS DIRECTED TO THE EXPERT WITNESS FUND AND THE SPECIAL ASSAULT UNIT WAS IN ERROR.

Whittles final two claims are that the trial court erred in imposing costs for the expert witness fund and the special assault unit. For the reasons set forth in his brief, the State agrees. Whittles's conviction and sentence should be affirmed and the cause remanded to strike these provisions from

the judgment.

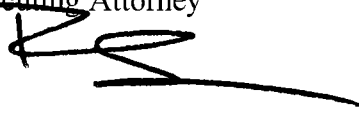
IV. CONCLUSION

For the foregoing reasons, Whittles's conviction and sentence should be affirmed.

DATED September 17, 2012.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R. Hauge', written over the printed name of Russell D. Hauge.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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KITSAP COUNTY PROSECUTOR

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Court of Appeals Case Number: 43127-1

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